STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPLICATION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

HARMONY MONTESSORI CENTER,

Petitioner/Appellee,

v.

Supreme Court No. 154819

Court of Appeals No. 326870
MTT Docket No. 0370214

CITY OF OAK PARK,

Respondent/Appellant.

_____/

ALVIN L. STORRS LOW-INCOME
TAXPAYER CLINIC
Joshua M. Wease (P61653)
Christina Thompson (P76436)
Attorneys for Petitioner/Appellant
P.O. Box 1570
East Lansing, MI 48826
(517) 432-6803

GARAN LUCOW MILLER, P.C.
By: Megan K. Cavanagh (P61978)
Ebony L. Duff (P65431)
Attorneys for Respondent-Appellee
1155 Brewery Park Blvd., Suite 200
Detroit, MI 48207-3192
(313) 446-5549

JOHNSON ROSATI SCHULTZ & JOPPICH, PC
By: Stephanie Simon Morita (P53864)
Attorneys for Michigan Municipal League and
Michigan Townships Association
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331
(248) 489-4100

_____/

***AMICUS CURIAE* SUPPLEMENTAL BRIEF**

ON BEHALF OF THE

MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN TOWNSHIPS ASSOCIATION

Dated: October 3, 2017

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

BASIS FOR SUPPLEMENTAL LEAVE TO APPEAL BRIEFING

The *Amici* provide this additional briefing in support of the City of Oak Park's position pursuant to the June 21, 2017 Order of this Court, and as also permitted by the September 15, 2017 Order of this Court allowing this Brief to be filed on or before October 4, 2017.

STATEMENT OF QUESTION PRESENTED

The *Amici* provide this statement of the question presented by the Court in its June 21, 2017 Order:

I. Where the educational scheme of the State of Michigan does not legislatively require preschool, or attendance in such programs, and where private schools are only considered sufficient substitutes for required public education if the private school is state approved with classes taught by state certified teachers, and where Appellant's school is not state approved and does not employ state certified teachers, does the current test provided by case law, appropriately determine whether an entity is a nonprofit educational institution entitled to property tax exempt status?

Appellant answers "no."

Appellee and *Amici* answer "yes."

The Tax Tribunal's answer is unknown because these issues were not raised before it.

The Court of Appeals would answer "yes".

This Court should answer "yes".

INTRODUCTION

Amici, in support of the City of Oak Park, provide additional briefing on the one issue contained within the June 21, 2017 Order of the Court: "whether *Ladies Literary Club v Grand Rapids*, 409 Mich 748 [; 298 NW2d 422] (1980), and *David Walcott Kendall Memorial School v Grand Rapids*, 11 Mich App 231[; 160 NW2d 778] (1968), continue to provide the appropriate test of what constitutes a, "nonprofit . . . educational . . . institution[]" under MCL 211.7n". The Appellant, a daycare and unaccredited preschool/kindergarten run without state certified teachers, was properly denied an exemption by Michigan Tax Tribunal, which denial was also properly upheld by the Court of Appeals. The State's constitutional and statutory educational scheme does not require state funded education before kindergarten, nor does it permit the education of children in the public schools, or private schools by non-certified teachers. Current case law appropriately sets forth the test where clearly Appellant's program cannot legally be a substitute for public education and therefore cannot substantially relieve the government's burden of providing a free public elementary education. The Appellant's Application for Leave to Appeal should be denied, and the decision of the Court of Appeals should be upheld.

STATEMENT OF FACTS

The *Amici* - Michigan Municipal League Legal and Michigan Townships Association - as interested parties responsible for providing essential services, and whose tax bases could be detrimentally and severely impacted should the decision of the Court of Appeals be overturned, have joined in support of the City of Oak Park's position supporting the decision of the Court of Appeals through the filing of this Supplemental *Amicus Curiae* Brief.

The *Amici* agree with and adopt by reference, and incorporate herein, the "Statement of Facts" set forth by the Appellee City of Oak Park in its Supplemental Brief in Answer to the Application for Leave to Appeal, and its Brief in Answer to the Application for Leave to Appeal. *Amici* also incorporate herein the Counter-Statement of Facts as stated in their Brief in Answer to the Application for Leave to Appeal.

The *Amici* further adopt by reference, and incorporate herein, Appellant Harmony Montessori's statement on page 1 of its Application for Leave to Appeal, that "[a]lthough Petitioner offers preschool and kindergarten programs, its teachers are not certified by the State of Michigan." *Amici*, additionally adopt by reference, and incorporate herein, paragraphs 19 and 20 of the Joint Stipulation of Facts, attached as Exhibit D to Appellant's Application for Leave to Appeal and which paragraphs state:

> 19. Petitioner is not accredited by the state of Michigan under the Revised School Code, MCL 380.1 *et seq.*
>
> 20. Petitioner's teacher-employees are not certified by the state of Michigan under the Revised School Code, MCL 380.1 *et seq.*

Amici point out, as set forth in the Joint Stipulation of Facts, attached as Exhibit D to Appellant's Application for Leave to Appeal, paragraph 23, that for each of the tax years in question, the number of attendees at Appellant's school ranged from 38 to 40 of which approximately 37% to 40% (14/38 to 16/40) did not participate in the either the Preschool or

kindergarten programs. The percentage of students not participating in the kindergarten program was approximately 79% to 90% (30/38 to 36/40) depending on the year.

ARGUMENT

The Court has asked the parties to address, "whether *Ladies Literary Club v Grand Rapids*, 409 Mich 748 [; 298 NW2d 422] (1980), and *David Walcott Kendall Memorial School v Grand Rapids*, 11 Mich App 231[; 160 NW2d 778] (1968), continue to provide the appropriate test of what constitutes a "nonprofit . . . educational . . . institution[]" under MCL 211.7n". In light of the current state supported educational scheme, and in this case where the Appellant employs no state certified teachers and therefore legally cannot be a substitute for state funded elementary education, existing case law continues to provide the appropriate test of what is a nonprofit educational institution entitled to property tax exempt status.

I. Where the educational scheme of the State of Michigan does not legislatively require preschool, or attendance in such programs, and where private schools are only considered sufficient substitutes for required public education if the private school is state approved with classes taught by state certified teachers, and where Appellant's school is not state approved and does not employ state certified teachers, the current test provided by case law, appropriately determines whether an entity is a nonprofit educational institution entitled to property tax exempt status.

A. Introduction

An entity, which by law, cannot provide an equivalent to the State's constitutionally mandated free elementary and secondary public education, should also not by law be entitled

to an educational institution property tax exemption under MCL 211.7n. Current case law appropriately sets forth the test for determining that Appellant is not an educational institution.

B. Standard of Review

This issue involves the interpretation to be given to a constitutional provision and the ensuing examination of whether the requirements of a statute have been met. As explained in *County of Wayne v Hathcock,* 471 Mich 445, 455; 684 NW2d 765 (2004), "[c]onstitutional issues, like questions of statutory construction, are subject to review *de novo*. [Footnote omitted]". Further, the:

> first inquiry, when interpreting constitutional provisions, "is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." [citation omitted]. This is accomplished by "applying each term's plain meaning at the time of ratification." [citation omitted].

County Rd Ass'n of Michigan v Governor, 474 Mich 11, 14–15; 705 NW2d 680 (2005).

C. Argument

1. *The Ladies Literary Club and David Walcott tests should be viewed in factual context in order to understand how to apply the tests.*

The Court has asked the parties to provide argument on whether*, "Ladies Literary Club v Grand Rapids*, 409 Mich 748 [; 298 NW2d 422] (1980), and *David Walcott Kendall Memorial School v Grand Rapids*, 11 Mich App 231[; 160 NW2d 778] (1968), continue to provide the appropriate test of what constitutes a "nonprofit . . . educational . . . institution[]" under MCL 211.7n"". Each of those cases presented a unique situation wherein an entity was seeking a property tax exemption as educational institution which needs to be examined in

order to determine whether the tests they provide are still appropriate, and how those tests should be applied.

In *Ladies Literary Club*, *supra.* at 751–752,

> Plaintiff was a major contributor in the founding of the Grand Rapids Public Library, and continues to promote reading and the enhancement of knowledge by providing a small library for public use. The library is housed in plaintiff's 93-year-old clubhouse along with a 480-seat auditorium and a nursery which cares for children during scheduled activities. The clubhouse, which has been designated a national and state historic site, is the subject of the disputed property tax.

The *Ladies Literary Club* Court further explained, at 755:

> It appears some club activities relate to the use of its theater. Plaintiff also provides a library for public use. The club clearly carries out laudable benevolent and charitable activities. Thus, it is possible to conclude that a part of the club's activities fall within the institutional exemption categories.
>
> Nevertheless, much of the organization's energy also is expended in promoting trips to see museum exhibits, music festivals, and plays; sponsoring lectures on antiques, music, and poetry; and conducting classes in painting, photography, and yoga. The club urges that these activities are predominantly educational in nature, thus compelling the determination that virtually all of the plaintiff's activities fall within one or another of the exemption categories.
>
> We cannot conclude that these educational or cultural programs may be considered as being sponsored by an "educational institution". Something more than serving the public interest is required to bring one claiming an exemption as an educational institution within the goals and policies affording a tax exemption.

The *Ladies Literary Club* situation was different to that found earlier in *David Walcott* where the Court of Appeals set forth:

> [t]he following facts, taken from the briefs and arguments of the parties to this appeal, concern[ing] the recognition of the corporation as an educational institution by other recognized authorities:

> 1. It is approved by the Michigan Board of Education. It is not accredited by the North Central Association of Colleges and Secondary Schools; nor is it accredited by the National Association of Schools of Art (application pending); nor is it rated by the American Association of Collegiate Registrars and Admissions Officers.
>
> 2. It is granted an exemption from Federal income tax, and its purchases are exempt from the sales and use taxes of the State of Michigan. Charitable contributions to it are deductible from income subject to Federal tax. Veterans' benefits are provided to qualified students by the Federal government. Draft deferments are given to qualified students.
>
> 3. The school holds membership in the American Institute of Design and the National Society of Interior Design. The University of Michigan and Michigan State University are the only other institutions in Michigan belonging to these associations, according to the testimony offered.

David Walcott Kendall Mem'l Sch. supra. at 233–34. It was with these underlying fact scenarios that the Court determined the Ladies Literary Club was not entitled to an education institution exemption, and the Court of Appeals determined the David Walcott Kendall Memorial School was entitled to an exemption.

The tests derived from both cases stem from the factual holdings in each case. In the *David Walcott* case, the Court of Appeals explained:

> We apply the observation of Justice Oliver Wendell Holmes made in the case of Merrill v. Preston (1884), 135 Mass. 451:
>
> > 'The successive neglect of a series of small distinctions in the effort to follow precedent, is very liable to end in perverting instruments from their plain meaning.'
>
> We also agree with the statement concerning the application of narrow precedents based on certain fact situations made by Justice Benjamin Cardozo in his treatise entitled the Growth of the Law at page 99:
>
> > 'The vigils and the quest yield at most a few remote analogies, which can be turned as easily to the service of one side as to the service of the other.'

> In finding that no court of this State has been presented with a request for a tax exemption by an institution of higher education in a similar position to that of the Kendall School of Design, we do not conceive these decisions concerning business schools in 1911 and 1948 to include all specialized institutions of higher education in 1963 or 1968. It may be said that business schools, beauty and barbering 'colleges', 'mechanics' schools and others of this nature are not to be given exemptions by reason of the goals and policies sought to be implemented by C.L.S.1961, s 211.7 [further citation omitted].
>
> We agree with the statement of the Court in *City of Detroit v Detroit Commercial College,* [citation omitted], **that an institution seeking exemption must fit into the general scheme of education provided by the State and supported by public taxation**. We find Kendall School of Design, admittedly an institution of specialized higher education, to fit into the scheme of education of this State. Were it not for the existence of the plaintiff institution, it is clear that the burden imposed on the art and design departments of our State supported colleges and universities would be appreciably increased. [Emphasis added].

David Walcott Kendall Mem'l Sch. supra. at 242-243. Then the Court of Appeals then went on to find:

> We formulate the following test to be applied in dealing with schools of higher education which seek tax exemption drawn from prior cases and the factual situation before us: ***If the particular institution in issue were not in existence, then would, and could, a substantial portion of the student body who now attend that school instead attend a State-supported college or university to continue their advanced education in that same major field of study?*** The probability of their attendance elsewhere on the college or university level would have to be derived Inter alia from the requirements for admission to the school seeking exemption, the qualifications of the student, the major field of study undertaken by the student, the time necessary to complete the prescribed course of study, and the comparative quality and quantity of the courses offered by the school to the same programs at the State colleges and universities. If such an institution is educating students qualified and willing to attend a State college or university, majoring in the same field of study, then it can be said that this institution is assuming a portion of the burden of educating the student which otherwise falls on tax-supported schools. [Emphasis added].

David Walcott Kendall Mem'l Sch. supra. at 240.

Then later in *Ladies Literary Club*, this Court summarized the *David Walcott* test as:

> an educational exemption may be available to an institution otherwise within the exemption definition, if the institution makes a substantial contribution to the relief of the burden of government.

Ladies Literary Club, *supra.* at 755-756. In discussing the *Ladies Literary Club* factual situation, the Court explained at 426-427:

> It cannot be maintained that were it not for the Ladies Literary Club's programs, which enhance educational and cultural interests, the burden on the state would be proportionately increased. The club's programs do not sufficiently relieve the government's educational burden to warrant the claimed educational institution exemption. [Citations omitted].
>
> The tribunal referee was correct in finding that plaintiff "is essentially a social club which happens to engage in some non-profit activities. While the community may benefit culturally from (plaintiff's) activities, these activities are not the type which entitle one to an exemption because he has relieved the community from the expense of a like service."

And it is with these prior factual situations and holdings that we turn to the present situation.

2. As applied to the facts of this case, the David Walcott and Ladies Literary Club tests continue to provide an appropriate test of what constitutes a nonprofit educational institution under the State's current constitutionally required free public elementary and secondary education.

The Court has asked the parties to brief whether the existing case law still provides and appropriate test of what is a nonprofit educational institution. *Amici* assert that it does, but the test cannot be applied in a vacuum and must be applied in the particular factual context of the exemption seeker in accordance with the current structure of the State of Michigan's educational system, just as was originally done in *David Walcott.* The structure of public

education in Michigan has changed over the last 200 years, and to some extent since both *David Walcott* and *Ladies Literary Club* were decided in 1968 and 1980, respectively. Originally the public school system in Michigan did not include high schools. The right of a municipality to tax for the support of a public high school was the subject of 1874 decision in *Stuart v School District No.1 of the Village of Kalamazoo*, 30 Mich 69 (1874). In *Stuart*, the Court provided a detailed State of Michigan constitutional and legislative history supporting free public education before it upheld a tax assessment for a public high school. In *Stuart, id.* at 84-85, the Court concluded:

> If these facts do not demonstrate clearly and conclusively a general state policy, beginning in 1817 and continuing until after the adoption of the present constitution, in the direction of free schools in which education, and at their option the elements of classical education, might be brought within the reach of all the children of the state, then, as it seems to us, nothing can demonstrate it. We might follow the subject further, and show that the subsequent legislation has all concurred with this policy, but it would be a waste of time and labor. We content ourselves with the statement that neither in our state policy, in our constitution, or in our laws, do we find the primary school districts restricted in the branches of knowledge which their officers may cause to be taught, or the grade of instruction that may be given, if their voters consent in regular form to bear the expense and raise the taxes for the purpose.

Like what was done by the *Stuart* Court, the State's applicable constitutional and statutory provisions should be examined to determine whether the Appellant Harmony Montessori fits within the scheme of public education such that a significant portion of its student body would attend a public school if Appellant did not exist, and in order to determine whether Appellant makes a substantial contribution to the relief of the burden of government.

In this regard, the analysis should start with the relevant constitutional provision(s). The Michigan Constitution, Const. 1963, Art. VIII, provides, in its pertinent part:

> ARTICLE VIII EDUCATION
>
> § 1 Encouragement of education. Sec. 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.
>
> § 2 Free public elementary and secondary schools; discrimination. Sec. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin. Nonpublic schools, prohibited aid. No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.
>
> . . .

In order to provide for the constitutionally mandated, "[f]ree public elementary and secondary schools", the legislature has enacted statutes, which in their most recent iteration is known as the Revised School Code (RSC), Act 451 of 1976, as amended, MCL 380.1 et seq.

The preamble to the RSC explains its purpose as:

> AN ACT to provide a **system of public instruction and elementary and secondary schools**; to revise, consolidate, and clarify the laws relating to **elementary and secondary education**; to provide for the organization, regulation, and maintenance of schools, school districts, public school academies, intermediate school districts, and other public school entities; to prescribe rights, powers, duties, and privileges of schools, school districts, public school academies, intermediate school districts, and other public school entities; to provide for the regulation of school teachers and certain other school employees; to provide for school elections and to prescribe powers and duties with respect thereto; to provide for the levy and collection of taxes; to

> provide for the borrowing of money and issuance of bonds and other evidences of indebtedness; to establish a fund and provide for expenditures from that fund; to make appropriations for certain purposes; to provide for and prescribe the powers and duties of certain state departments, the state board of education, and certain other boards and officials; to provide for licensure of boarding schools; to prescribe penalties; and to repeal acts and parts of acts. [Emphasis added].

It is through this legislation that the legislature meets its Const. 1963, Art. VIII § 2, requirement to "maintain and support a system of free public elementary and secondary schools as defined by law". Public schools are defined within the RSC to mean:

> a public elementary or secondary educational entity or agency that is established under this act or under other law of this state, has as its primary mission the teaching and learning of academic and vocational-technical skills and knowledge, and is operated by a school district, intermediate school district, school of excellence corporation, public school academy corporation, strict discipline academy corporation, urban high school academy corporation, or by the department, the state board, or another public body. Public school also includes a laboratory school or other elementary or secondary school that is controlled and operated by a state public university described in section 4, 5, or 6 of article VIII of the state constitution of 1963.

MCL 380.5(8).

Within the RSC, school districts are given their general powers and duties. Specifically, in MCL 380.11a, it states:

> (1) Beginning on July 1, 1996, each school district formerly organized as a primary school district or as a school district of the fourth class, third class, or second class **shall** be a general powers school district under this act.
>
> (2) Beginning on July 1, 1996, a school district operating under a special or local act **shall** operate as a general powers school district under this act except to the extent that the special or local act is inconsistent with this act. Upon repeal of a special or local act that governs a school district, that school district **shall** become a general powers school district under this act.

> (3) A general powers school district has all of the rights, powers, and duties expressly stated in this act; **may** exercise a power implied or incident to a power expressly stated in this act; and, except as otherwise provided by law, **may** exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education services in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:
>
> (a) Educating pupils. **In addition to educating pupils in grades K-12, this function *may* include operation of preschool**, lifelong education, adult education, community education, training, enrichment, and recreation programs for other persons. . . . [Emphasis added].
>
> . . .

While these provisions provide that preschool "may" be offered, it does not mandate that preschool "shall" be offered by any school district.[1]

As explained in *Browder v Int'l Fid. Ins. Co.*, 413 Mich 603, 611; 321 NW2d 668 (1982):

> The primary purpose of statutory construction is to ascertain and give effect to the intention of the Legislature. The rules of construction established by the courts over the years "serve but as guides to assist the courts in determining such intent with a greater degree of certainty". [Citations omitted]. A basic rule of statutory construction is that where the Legislature uses certain and unambiguous language, the plain meaning of the statute must be followed. [Citations omitted].

The *Browder* Court also went on to discuss the use of "shall" versus "may" in a statute, and wrote:

> A necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word "shall" and the permissive word "may" unless to do so would clearly frustrate legislative intent as evidenced by

[1] Similarly, MCL 380.601a, which pertains to intermediate school districts, also states in its subsection (1)(a), " . . . In addition to educating pupils in grades K-12, this function may include operation of preschool, . . .".

> other statutory language or by reading the statute as a whole. [Citations omitted]. Thus, the presumption is that "shall" is mandatory.

Id. at 612. But in situations like we have here with the RSC, where the legislature has used both "may" and "shall", the following explanation from *Smith v Sch. Dist. No. 6 Fractional, Amber Twp., Mason Cty.,* 241 Mich 266, 368-369; 217 NW2d 12 (1928), is instructive:

> Courts have not infrequently construed the word 'may' to mean 'shall' and vice versa. But this has been done to effectuate the legislative intent. It should not be done to stifle that intent. Here the Legislature has used both the word 'may' and the word 'shall,' and we should give them their ordinary and accepted meaning, unless so to do would frustrate the legislative intent. We are satisfied that a proper construction of the act requires the giving of the words their ordinary and accepted meaning. By the use of the word 'may' in the first section, the Legislature authorized and permitted the board of education to come under the provisions of the act, if it so desired. By the use of the word 'shall' in the other portions of the act, it was the legislative intent that, if the board of education adopted the act, then such other provisions became mandatory and the board of education became bound to follow and enforce them. In other words, districts 'may' come under the provisions of the act. If they do, its provisions 'shall' be followed. This construction, we think, is the logical one.

In our case, while the RSC, and in particular MCL 380.11a, provides that school districts "shall" be general powers school districts in subsections (1) and (2), in subsection (3)(a) it provides that a general powers school district operations "may" include a preschool. Simply, there is no requirement in the law that a school district operate a preschool, and the RSC is also devoid of any mention of the "great start readiness" program.

Interestingly, the RSC does anticipate that public schools may operate childcare centers, but it is clear from the applicable statute, 380.1285a, that the parameters of childcare to be provided starts with kindergarten (grade K), and not earlier. *See* MCL 380.1285a attached hereto as Exhibit A. Further, the constitutionally required elementary and secondary school

system provided for in the RSC, should not be confused with other non-mandatory statutory reimbursement provisions which are not part of the State's constitutional educational burden. As an example, The State School Aid Act of 1979, MCL 388.1601 et seq., according to its preamble is:

> AN ACT to make appropriations to aid in the support of public schools, the intermediate school districts, community colleges and public universities of the state; to make appropriations for certain other purposes relating to education; to provide for the disbursement of the appropriations . . .

However, and while The State School Aid Act of 1979 provides for definitions of pupil (MCL.1606(6)), and membership counts based upon the number of pupils in "K to 12 actually enrolled" (MCL 388.1606(4)) for purposes of reimbursement from the State, "preschool" is only mentioned in a very limited capacity and not in any manner which suggests that there is a fully State funded free preschool obligation within any school district. In MCL 388.1604(2), "preschool" is mentioned within this sentence: "For the purposes of calculating universal service fund (e-rate) discounts, "elementary pupil" includes children enrolled in a preschool program operated by a district in its facilities."[2] Other mentions of "preschool" occur within MCL 388.1621g(b) (repealed as of October 1, 2017), MCL 388.1632d (great start readiness grant funding eligibility and application requirements), MCL 388.1632q (early childhood collaborative pilot program), MCL 388.1651d (federal fund grant allocations), and MCL 388.1694a (educational data collection). Nothing within these various statutes requires or even suggests that "preschool" is in envisioned as part of the State's required constitutional and statutory educational scheme, or more specifically that any school district is required to offer a preschool program. This is consistent with the RSC which clearly does not mandate a preschool program.

[2] The inclusion of a preschool student for included in the count for purposes of an "e-rate discount" should not be confused with the attendance count required under MCL 388.1701 for the allocation of state aid.

The fact that a pre-kindergarten program is not part of the State's required free public education program comports with other provisions within the RSC, notably Part 24 of the RSC, entitled "Compulsory School Attendance", MCL 380.1561 et seq. A child in the State of Michigan is not required to start school before the age of 5 or 6 (depending on whether the child's birthday falls on or after December 1). The applicable statute, MCL 380.1561, states:

> **380.1561 Compulsory attendance at public school; enrollment dates; exceptions.**
>
> Sec. 1561.
>
> (1) Except as otherwise provided in this section, for a child who turned age 11 before December 1, 2009 or who entered grade 6 before 2009, the child's parent, guardian, or other person in this state having control and charge of the child shall send that child to a public school during the entire school year from the age of 6 to the child's sixteenth birthday. Except as otherwise provided in this section, for a child who turns age 11 on or after December 1, 2009 or a child who was age 11 before that date and enters grade 6 in 2009 or later, the child's parent, guardian, or other person in this state having control and charge of the child shall send the child to a public school during the entire school year from the age of 6 to the child's eighteenth birthday. The child's attendance shall be continuous and consecutive for the school year fixed by the school district in which the child is enrolled. . . .
>
> (2) A child becoming 6 years of age before December 1 shall be enrolled on the first school day of the school year in which the child's sixth birthday occurs, and a child becoming 6 years of age on or after December 1 shall be enrolled on the first school day of the school year following the school year in which the child's sixth birthday occurs.
>
> . . .

Technically, under this statute, a parent is not legally required to enroll his or her child in school until the time most children are in first grade, or kindergarten if the parent decides to hold back the child a year. This also explains why Appellant's student population ends at age 6. As will be discussed, Appellant cannot legally educate children at this age.

3. Children are not required by law to go to school until age 6, and can only go to a private school if it is state approved and employs certified teachers.

There is a statutory exception to attend public school which is contained within, MCL 380.1561(3) which allows a child to forgo public school at age 6 if:

> (a) The child is attending regularly and is being taught in a **state approved nonpublic school,** which teaches subjects comparable to those taught in the public schools to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which the nonpublic school is located. [Emphasis added].

Failure to comply with Part 24 of the RSC, can subject a parent to misdemeanor criminal sanctions under MCL 380.1599. Nonpublic schools are authorized through the "Private, Denominational, and Parochial Schools", Act 302 of 1921, as amended, MCL 388.551 et seq. In MCL 388.551, it provides that, " . . . [i]t is the intent of this act that the sanitary conditions of the schools subject to this act, the courses of study in those schools, and the qualifications of the teachers in those schools shall be of the same standard as provided by the by the general laws of this state." MCL 388.551. Private, denominational, and parochial schools are defined in MCL 388.552 as, " . . . any school other than a public school giving instruction to children below age 16 years, in the first 8 grades as provided for the public schools of the state, such school not being under the exclusive supervision and control of the officials having charge of the public schools of the state." Furthermore, and since 1925, "[n]o person shall teach or give instruction in any of the regular or elementary grade studies in any private, denominational or parochial school within this state who does not hold a certificate such as would qualify him or her to teach like grades of the public schools of this state." MCL 388.553.

4. The Ladies Literary Club and David Walcott tests, as applied to the facts of this case, continue to provide the appropriate test of what constitutes a nonprofit education institution.

With an understanding of the constitutional and statutory framework for publicly funded elementary and secondary schools, and the requirements to operate a private, denominational or parochial school, we can now turn towards answering the question of "whether *Ladies Literary Club v Grand Rapids*, 409 Mich 748 [; 298 NW2d 422] (1980), and *David Walcott Kendall Memorial School v Grand Rapids*, 11 Mich App 231[; 160 NW2d 778] (1968), continue to provide the appropriate test of what constitutes a, "nonprofit . . . educational . . . institution[]" under MCL 211.7n". The test, briefly summarized as whether the Appellant fits within the scheme of public education such that a significant portion of its student body would attend a public school if Appellant did not exist, and does Appellant therefore make a substantial contribution to the relief of the burden of government, still provides an appropriate test for what constitutes nonprofit educational institution provided it is analyzed in the context of the existing public education scheme in the State of Michigan.

Particularly, and as applied to the case at hand, current constitutional and statutory provisions require free public elementary and secondary education. Children are not required by law to attend school before age 5 or 6 depending on date of birth. For most children, this means they can wait until 1st grade to start a State funded elementary schools. Further, the State is not required to provide public education until children are "of age" and enter kindergarten. The RSC does not mandate preschool, and private schools can only be a substitute for public schools provided the teachers are certified in the same manner as public school teachers. If a child is "of age", the child must enter public school or attend a private school of the same standard as public school. If a child does not attend as required, parents can be charged with a crime.

The Appellant in this case, is not a state approved private school which can be used as a substitute for publicly funded education, and none of the teachers at the Appellant school are certified by the State of Michigan. By law, Appellant cannot provide the constitutionally required education typically borne by the public schools of the State. Further, and as a result, Appellant cannot by law make a substantial contribution to the relief of the burden of government. The current public school scheme does not mandate preschool, and does not provide for childcare for children younger than what is accepted for kindergarten. Appellant's student population for each of the tax years in question ranged from 38 to 40 students. The percentage of students not participating in the kindergarten program was approximately 79% to 90% (30/38 to 36/40) depending on the year. In addition, because its teachers are not certified, Appellant cannot legally provide a state approved kindergarten program. Providing a kindergarten curriculum is not the same as offering a state approved kindergarten program. There is absolutely no relief being provided to the burden of government. Appellant should not be afforded any relief from its property taxes.

The exemption statute at issue, MCL 211.7n, states:

> Real estate or personal property owned and occupied by nonprofit theater, library, educational, or scientific institutions incorporated under the laws of this state with the buildings and other property thereon while occupied by them solely for the purposes for which the institutions were incorporated is exempt from taxation under this act. In addition, real estate or personal property owned and occupied by a nonprofit organization organized under the laws of this state devoted exclusively to fostering the development of literature, music, painting, or sculpture which substantially enhances the cultural environment of a community as a whole, is available to the general public on a regular basis, and is occupied by it solely for the purposes for which the organization was incorporated is exempt from taxation under this act.

This statute should continue to be narrowly construed, as it has been under current tests. Under Appellant's theory, and applying the proverbial mountain high slippery slope, every

household with a child under the age of five should be entitled to a tax exemption. Certainly, it could be claimed that parents who teach their children their first words and toilet train them are providing the "foundational and mandatory early childhood skills" that Appellant argues should result in tax exempt status. But, the teaching of these types of basic skills is not what is constitutionally and statutorily mandated as part of the State's free public elementary education. The purpose of providing a free public education, and exempting from taxation those entities that substantially relieve the State's burden of providing such an education, is to afford children an education which is beyond the basics. In examining the current constitutional and statutory educational scheme, as was also done by the Court in the 1874 decision *Stuart v School District No.1 of the Village of Kalamazoo*, supra. at 85, it should be clear that it is not the intent for the State (and its taxpayers) to "bear the expense and raise taxes" for the activities and services provided by Appellant. As a result, Appellant should not be deemed to have relieved a substantial governmental burden such that it is entitled to a tax exemption.

D. Conclusion

As can be seen from how the tests at issue can be applied, provided they are examined in light of the current constitutional and statutory requirements for free public education in this State, "*Ladies Literary Club v Grand Rapids*, 409 Mich 748 [; 298 NW2d 422] (1980), and *David Walcott Kendall Memorial School v Grand Rapids*, 11 Mich App 231[; 160 NW2d 778] (1968), continue to provide the appropriate test of what constitutes a "nonprofit . . . educational . . . institution[]" under MCL 211.7n". Preschool or other early childhood programs are not part of the mandated educational system in the State. An entity which does provide these non-mandated services but which cannot, by law, provide the constitutionally mandated free public

education (or its state certified equivalent) should not be afforded an exemption from property taxes as an educational institution. The Appellant makes no substantial contribution to the relief of the burden of government. A child who is required by law to attend school, could not and would not attend Appellant's school. A child whose parents wanted that child to attend a private preschool or kindergarten which met the same requirements as a public school or state approved private school, could not and would not go to Appellant's school. In light of the current state supported educational scheme, and in this case where the Appellant employs no state certified teachers and therefore legally cannot be a substitute for state funded elementary education, existing case law continues to provide the appropriate test to determine what is a nonprofit educational institution entitled to property tax exempt status.

CONCLUSION

The result of the Court of Appeals decision was correct, and its decision denying the Appellant a property tax exemption as an educational institution should be upheld. The proper result should be the denial of the application for leave to appeal.

Respectfully Submitted,

JOHNSON ROSATI SCHULTZ & JOPPICH, PC

/s/Stephanie Simon Morita

By: Stephanie Simon Morita (P53864)
Attorneys for *Amici Curiae* Michigan Municipal League *et al.*
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331
(248) 489-4100

Dated: October 3, 2017

INDEX OF EXHIBITS

A. MCL 380.1285a

EXHIBIT A

THE REVISED SCHOOL CODE (EXCERPT)
Act 451 of 1976

380.1285a Child care center subject to fire prevention or fire safety requirements; requirements for operation of before- or after-school program.

Sec. 1285a. (1) If a school district or intermediate school district operates a child care center, as defined in section 1 of 1973 PA 116, MCL 722.111, then, except as provided in this subsection, the child care center is subject to the requirements of 1973 PA 116, MCL 722.111 to 722.128. If a child care center established and operated by a school district or intermediate school district is located in a school building that is approved and inspected by the bureau of fire services created in section 1b of the fire prevention code, 1941 PA 207, MCL 29.1b, or other similar authority as provided in section 3 of 1937 PA 306, MCL 388.853, for school purposes and is in compliance with school fire safety rules, as determined by the bureau of fire services or a fire inspector certified pursuant to section 2b of the fire prevention code, 1941 PA 207, MCL 29.2b, the child care center is not subject to any fire prevention or fire safety requirements under 1973 PA 116, MCL 722.111 to 722.128. Beginning July 1, 2003, as used in this subsection, "child care center" does not include a program described in subsection (2) that has been granted an exemption from child care center approval by the department of human services as provided under section 1(2) of 1973 PA 116, MCL 722.111.

(2) Beginning July 1, 2003, if a school district, public school academy, or intermediate school district operates or contracts for the operation of a before- or after-school program for children in grades K to 8, and if the program is exempt from child care center approval as provided under section 1(2) of 1973 PA 116, MCL 722.111, all of the following apply to the operation of the program:

(a) The program shall meet all of the following staffing requirements:

(*i*) Shall have at least 2 adult program staff members present at all times when children are present.

(*ii*) Shall have a child to adult program staff member ratio that meets the following:

(A) For children in grades K to 3, is no greater than the lesser of either 20 children to 1 adult program staff member or the average pupil to teacher ratio during school hours in that school district, public school academy, or intermediate school district in regular K to 3 classrooms.

(B) For children in grades 4 to 8, is no greater than the lesser of either 25 children to 1 adult program staff member or the average pupil to teacher ratio during school hours in that school district, public school academy, or intermediate school district in regular grade 4 to 8 classrooms.

(*iii*) Within 3 months after he or she begins to work in the program, each adult program staff member shall hold valid certification in cardiopulmonary resuscitation and basic first aid issued by the American red cross, American heart association, or a comparable organization or institution approved by the department.

(b) The program shall be located at school in facilities comparable to rooms used by pupils during the regular school day.

(c) The program shall provide daily activities and relationships that offer each child in the program opportunities for physical development; social development, including positive self-concept; and intellectual development.

(d) If food is served, the food service shall comply with the same nutrition requirements that apply to food service by the school district, public school academy, or intermediate school district during the regular school day.

(e) If the school district, public school academy, or intermediate school district uses its employees to staff the program, before assigning a staff member to work in the program, the school district, public school academy, or intermediate school district shall comply with sections 1230 and 1230a with respect to that individual to the same extent as if the individual were being hired as a teacher. If the school district, public school academy, or intermediate school district contracts for the operation or staffing of the program, the contract shall contain assurance that the contracting person or entity, before assigning an individual to work in the program, will comply with sections 1230 and 1230a with respect to that individual to the same extent as if the person or entity were a school district employing the individual as a teacher. The department of state police shall provide information to a school district, public school academy, intermediate school district, or contracting person or entity requesting information under this subdivision to the same extent as if the school district, public school academy, intermediate school district, or person or entity were a school district making the request under section 1230 or 1230a.

(f) The board of the school district or intermediate school district or board of directors of the public school academy, in consultation with the director of the program and the principal of the school at which the program is operated, shall develop, adopt, and annually review a policy concerning the program that, at a minimum, addresses safety procedures for the program, including first aid, food safety, discipline, dispensing and storage of medication, and access to student emergency information and telephones.

(g) Not later than September 1 of each school year, the board of the school district or intermediate school district or board of directors of the public school academy shall adopt and submit to the secretary of the intermediate school board a resolution affirming that the program and the corresponding policies comply with this section. This submission shall include a copy of the policy under subdivision (f).

(h) The board of the school district or intermediate school district or board of directors of the public school academy shall make copies of the policy under subdivision (f), and of any annual reviews or revisions, available to the public.

(3) Not later than April 1, 2003, the department, in consultation with the department of human services, shall develop and make available to the public model standards for before- or after-school programs operated under subsection (2) that address human relationships; indoor environment; outdoor environment; activities; safety, health, and nutrition; and administration. In developing these model standards, the department shall give substantial consideration to similar factors in the requirements placed on child care centers under 1973 PA 116, MCL 722.111 to 722.128. A school district, public school academy, or intermediate school district is not required to follow these model standards.

(4) Beginning July 1, 2003, the board of a school district or intermediate school district or board of directors of a public school academy shall ensure that any written information published or distributed by the school district, public school academy, or intermediate school district concerning a before- or after-school program it operates under subsection (2) includes a statement in at least 10-point type notifying the public whether the program follows or deviates from the model standards developed under subsection (3).

History: Add. 1996, Act 285, Imd. Eff. June 17, 1996;Am. 2002, Act 695, Eff. Mar. 31, 2003;Am. 2006, Act 198, Imd. Eff. June 19, 2006.

Compiler's note: For transfer of powers and duties of state fire marshal to department of labor and economic growth, bureau of construction codes and fire safety, by type II transfer, see E.R.O. No. 2003-1, compiled at MCL 445.2011.

Popular name: Act 451